

Indigent Defense Planning for Marquette County

Background

The sixth amendment of the U.S. Constitution guarantees defendants the right to representation at a trial. Two U.S. Supreme Court cases, *Gideon v. Wainwright* in 1962 and *Argersinger v. Hamlin* in 1972, established the right of someone who cannot afford a lawyer to have a court-appointed lawyer for felonies and misdemeanors that could result in jail time. Like elsewhere, courts in Michigan were required to provide defense counsel to the indigent.

Unfortunately, the implementation of indigent defense suffered from some common problems. Defendants were rushed through the process, often did not see their lawyers until immediately before a court appearance, and often lacked access to investigations or experts in their defense. In 2007, the American Civil Liberties Union sued the state, citing specific cases in Berrien, Genesee and Muskegon counties. The state, not the counties, was the target of the lawsuit. Eventually, the case was settled out of court with an agreement that Michigan's standards for indigent defense would change.

The state legislature created the Michigan Indigent Defense Commission (MIDC) in 2013, with the charge of establishing a system by which Michigan would meet the criteria of the settlement. In 2017, the MIDC issued four new standards designed to address concerns in the lawsuit. Those four standards were approved by the Department of Licensing and Regulatory Affairs (LARA) on May 22nd, giving Michigan counties 180 days (or until November 20th) to come up with a compliance plan. Counties have freedom to comply with the standards in the ways they best see fit. This document is intended to help the Board decide what sort of plan Marquette County will file.

Under state law, the state will pay for the difference in cost between any proposal made to the MIDC and a three-year average of existing costs (the local share). **For Marquette County, the local share is \$224,971. If the Michigan Legislature does not fund the compliance plans, the County will not be required to meet the standards.** Taking this at face value, it would be prudent to select the best, as opposed to the cheapest, solution.

Current process

The system currently in place works largely on a system of familiarity and mutual respect between the various offices. Judges, prosecutors, and defense attorneys all seem aware of a sense of proportion in the prosecution of crimes, and respect each other's roles. This is a strength of the tight-knit community that we live in. In a way, however, it is also a vulnerability, because it ultimately rests on the good will,

sense of fairness, and camaraderie of the individual people involved. These factors are not universally found in Michigan's court systems.

After a person has been arrested, a magistrate or judge sets bond for the defendant. He or she then appears before a judge in District Court for arraignment, in which he or she hears the charges against him or her. This is the first (and in many cases, last) appearance in court for the defendant. Under current procedure in Marquette County, this is the time at which the court might appoint an attorney. The judge asks the defendant if he or she needs a court-appointed attorney. If the answer is yes, and the judge feels that the defendant is qualified, then the judge asks the court clerk to assign an attorney from the approved list of attorneys. The court clerk notifies the defendant of the attorney's name and contact information and directs the defendant to make an appointment.

The court-appointed attorney is present for pre-trial hearings. At this stage, many cases are settled through plea bargaining and the attorney's advice is critical. If the case goes to trial, the attorney is present for the trial itself.

Indigent defense is available only in criminal cases which will potentially result in jail time. The new standards apply only in cases before District Court or Circuit Court. The changes do not apply to Probate Court.

New approved standards (MIDC), approved April 2017

In April of 2017, the MIDC released new standards to be followed by all district and circuit courts in Michigan. The purpose of this plan is to evaluate some systems for meeting those standards.

The standards concern (1) education and training of defense counsel, (2) initial interview with counsel, (3) defense investigation and experts, and (4) counsel present at first appearance in court and other critical stages.

Education and Training of Counsel

The standards require that attorneys available for indigent defense have knowledge of the law, scientific evidence and applicable defenses, technology (including office technology), and continuing education (with no financial burden on counsel). Significant questions remain regarding who sets the standards for that education, where and how it will be provided, and if travel costs for multiple attorneys will be covered. Some kind of Upper Peninsula training may be available, but currently, most training is at conferences held in the Lower Peninsula.

Initial Interview

The standards for initial interview are focused on sufficient time and space where attorney-client confidentiality is protected. The initial interview is a critical stage in the attorney-client relationship, when the two parties first meet each other and must develop some kind of trust. It is also a time when counsel can help advise the defendant on how events should proceed. Counsel can make a motion for pre-trial release and determine if an investigation should be started immediately. Special needs for difficulties in language, mental health, or physical health can also be determined.

The initial interview is also important for counsel to quickly get an idea of what kind of preparation might be required, as well as an assessment of how well the defendant understands the charges. This requires enough time for the attorney to fully assess the situation.

One problem with attorney-client meetings at the courthouse is that there are inadequate spaces for private meetings. While there is a private attorney-client meeting room on the second floor of the historic courthouse near the Circuit Court, there are no meeting rooms near the District Court in the annex. District Court is where the majority of traffic occurs in Marquette County's court system. A plan has been identified to build two private attorney-client spaces on the second floor of the courthouse annex, near the District Court. The use of these rooms would likely not be restricted to court-appointed attorneys. Demand for them may be high enough that there will be a need to assign times, much like what happens with conference rooms in the courthouse complex.

The meeting between defendant and counsel must be private. This is critical for the defendant to develop a sense of trust that counsel is acting in his or her best interest, and reduces the inappropriate spread of evidence out of context. In order to protect confidentiality, the proposal to the MIDC will include plans to build two new attorney-client meeting rooms and retrofit one existing room (total cost: \$28,500), as well as to use confidential videoconferencing via polycomm systems (total cost: \$4,500).

Investigations and Experts

Currently, judges approve or disapprove defense requests for investigations or experts. The MIDC sees this as an interference in the independence and abilities of counsel to mount a credible defense. While few requests are made or turned down under the current system, the new standards would require that such requests be administered outside the court system.

Counsel at First Appearance and Other Critical Stages

Of all of the MIDC standards, this one seems to create the most concern. The standard says that counsel shall be assigned as soon as a client is determined eligible for indigent services. Under the current process, that eligibility is determined by a judge at arraignment, the first appearance. A new system will be required to determine a client's eligibility for a court-appointed attorney.

Some judges fear that this would (1) delay the arraignment process, as a defendant would have to have time to meet with an attorney before hearing charges, and (2) lead to a more crowded court agenda as more defendants plead not guilty.

In addition, the standard requires that counsel shall be available for pre-trial hearings, plea negotiations and other critical stages.

More Standards Coming

The MIDC has already proposed four additional standards for review and approval. These likely will take effect sometime in 2018. The new standards include:

- 1. Independence from the Judiciary**

This standard is designed to give judges only as much influence over indigent defense counsel as

they have over retained counsel or prosecutors. “The court’s role shall be limited to: informing defendants of right to counsel; making a determination of indigency and entitlement to appointment; if deemed eligible for counsel, referring the defendant to the appropriate agency (absent a valid waiver); and contributing information and advice concerning the system.” In other words, judges would no longer be choosing attorneys for a case, however well-intentioned they may be.

2. **Indigent Defense Workloads**

In some states, indigent defense counsel has been rendered ineffective by the sheer volume of work. Until special Michigan-specific studies are completed on the workload of indigent defense attorneys, the workload for any individual attorney shall not exceed 150 felonies or 400 non-traffic misdemeanors per year.

3. **Qualification and Review**

This standard would set minimum standards for determining if an attorney is eligible to serve in an indigent defense role for misdemeanors, low-severity felony cases, or high-severity felony cases. Marquette County already has instituted a similar kind of process.

4. **Economic Disincentives or Incentives**

In some Michigan counties, few attorneys are willing to take on court-appointed cases because the pay rates are so much lower than private attorney pay rates. The standard, which has not been adopted, states:

Attorney hourly rates shall be at least \$100 per hour for misdemeanors, \$110 per hour for non-life offense felonies, and \$120 per hour for life offense felonies. These rates must be adjusted annually for cost of living increases consistent with economic adjustments made to State of Michigan employees’ salaries. Counsel must also be reimbursed for case-related expenses as specified in Section E.

It should be noted that as the current law is written, the State would pick up any additional costs imposed by this standard. Unlike publicly-hired attorneys, private attorneys must cover their own overhead costs, and the proposed pay rate reflects this.

Alternatives

While the new standards impose some fixed costs, the County has flexibility in how it meets them. Three scenarios are considered for the County: (1) hiring a single firm to handle indigent defense for Marquette County; (2) continue hiring attorneys from a variety of firms; or (3) create a Public Defender office within the County.

Hired firm or firms

Under this scenario, Marquette County would contract with a single legal firm to provide all services related to indigent defense. The contract could be set up with payment per hour, per case or per year. Not only would the legal firm provide attorneys, but also some of the administrative support. There would have to be some level of County oversight, which could not be provided by the courts. This could be handled by another attorney or professional with legal expertise who could be separately contracted.

Pros:

- County does not maintain overhead
- Consistent representation—same people work each case

Cons:

- Must negotiate fees
- There is probably no firm in Marquette County big enough to handle this
- We could use multiple firms, but this would be more difficult to manage for compliance

Estimated cost to hire a firm to handle indigent defense work, plus a county-employed administrator to oversee the system:

Local share: \$224,971

**State share: estimated at \$677,156, same rate as for maintaining assigned counsel list
(subject to negotiation)**

Total: estimated at \$902,127

Maintain current system, but with required modifications to meet new standards

Marquette County currently contracts with a number of local attorneys to provide indigent defense services. This system could be continued, but would change under the new standards. An administrator not associated with the court system would have to manage the list of qualified attorneys, approve or disapprove investigation and expert costs, and provide monitoring information to the State to show compliance.

Pros:

- Continue with existing system that everyone is familiar with
- Larger pool of attorneys to draw from, helping with cases of conflict or multiple defendants

Cons:

- Abilities of attorneys on list can vary widely
- Under new standards, there will have to be a separate County or contracted position to manage the list, make sure that attorneys on the list are maintaining their continuing education, and certify that they are in compliance.

If either of the other systems is adopted, Marquette County will still need to contract with other attorneys to cover situations where there are either conflicts or insufficient resources to handle a case.

Estimated cost of an appointed-attorney list to handle indigent defense, plus a county-employed administrator to oversee the system:

Local share	\$224,971
State share	\$667,156
Total	\$902,127

Public Defender office

Under this scenario, the County would create a new department, the Public Defender's office, in much the same way that the County has a Prosecutor's office. The County would provide a space and administrative and technical support. Indigent defense attorneys would be County employees.

This system would still require a separate contract with a firm or list of attorneys to provide coverage for occasional conflicts, multiple defendants, or other needs for backup coverage.

Pros:

- More consistent defense—the same people would be involved in all cases
- Attorneys quickly gain experience because they are not dealing with other issues
- Can be a resource for other defense attorneys in area
- Can administer the new state standards
- More predictable costs (funded in a way similar to Prosecutor's office)
- Saves time in managing attorney list (scheduling)

Cons:

- County is responsible for administering overhead of an office (space, staff support, utilities, information technology support), even if State is ultimately paying the bill.
- If not funded properly, could result in overworked staff who cannot provide constitutionally-required level of service
- Addressing point above, may have to hire more people, especially if proposal on indigent defense workloads is approved

Estimated cost of a Public Defender office:

Local share	\$224,971
State share	\$621,641
Total	\$846,112

Recommendation

Option 3, a Public Defender office, seems to be the best way of assuring that Marquette County meets the standards set forth by the MIDC. Unsolicited support for this option was offered by judges, prosecuting attorneys, defense attorneys, and even the county jail administrator. As an “in house” function, the Public Defender office would be a focal point for all of the activities surrounding indigent defense, from the provision of attorneys to the proper administration of their activities. The consistent presence of a dedicated, internal office was cited as a major reason for supporting a public defender. From a financial point of view, a County office would have a more predictable budget and guidelines than an office run outside the County. It would also create a smoother interface between the various County offices which are already involved in the judicial process. The same people would be involved in every case.

Under this plan, a reduced form of the current attorney list would have to be maintained, but its administration would be done in the public defender’s office, not the courts. An advantage of the public defender’s office is that administrative functions like the list can still be carried out in an office that is integrally involved in the judicial process.

Staffing would likely consist of a chief public defender, two assistant public defenders, an administrative aide and a legal secretary. Office space would be rented somewhere near the courthouse, and the office would be supplied with furniture, computer equipment, and IT support.